Environmental assessment legislation: Bill C-78 and regimes in other countries

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ENVIRONMENTAL ASSESSMENT LEGISLATION: BILL C-78 AND REGIMES IN OTHER COUNTRIES

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INTRODUCTION

This paper analyzes several legislated environmental assessment regimes in other countries and compares them with Canada's proposed scheme as set out in Bill C-78: the *Canadian Environmental Assessment Act*. The following countries were included as being the most useful for purposes of comparison:

- the countries of the European Community;
- the United States of America; and
- the countries of the Pacific Rim, including Australia, Japan and New Zealand.

As the effectiveness of each foreign process is examined, it will become clear that each has elements that are instructive for Canadians considering the proposals in Bill C-78. It will also become clear that to some extent Bill C-78 represents an advance in the legislation of environmental assessment schemes.

ENVIRONMENTAL ASSESSMENT LEGISLATION OF THE EUROPEAN COMMUNITY

The Council of Ministers adopted a Directive[1] on environmental impact assessment (EIA) on 27 June 1985. The Directive

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(1) A Directive is a Community law which is binding in terms of the result to be achieved, but which allows Member States to choose the form and method of implementation. This Directive was to have been implemented within three years, but this goal was not met.

requires a developer, whether in the public or private sector, to submit information on any project likely to have significant effects on the environment. This information is made available to the public and to those agencies with environmental responsibilities. Member States must designate authorities to review environmental impact studies prepared by developers and must ensure that members of the public have an opportunity to express their concerns and objections before a project starts.

The scope of the Directive covers impacts on the biophysical environment, including human beings, flora and fauna, soil, water, air, climatic factors and the landscape, material assets and cultural heritage. The Directive contains two classes of public and private projects: those that must be assessed (Annex I), and those that may be assessed (Annex II). Annex I projects include: crude-oil refineries, thermal power stations, facilities to store or dispose of radioactive waste, asbestos-processing plants, road, railway and airport construction, large port facilities, and treatment plants or storage sites for toxic and dangerous wastes. The list in Annex II is much longer and includes agricultural, processing, manufacturing, energy production, infrastructure, and waste disposal projects. These are to be assessed when Member States "consider that their characteristics so require." General criteria for Annex II projects may be drawn up or decisions to assess additional projects may be made on an *ad hoc* basis.

Individual projects may be exempted from assessment, but the Member State is required to consider whether another form of assessment would be appropriate and both the Commission of the European Communities (EC Commission) and the public must be informed of the reasons justifying the exemption. When a State is aware that a project on its territory is likely to have adverse transboundary environmental impacts, it must inform the other Member States at the same time as it informs its own nationals. States are to develop bilaterally mechanisms for information exchange.

When decisions are taken about the start of a project, the competent authority informs the concerned public about the decision, including the rationale for it and any relevant conditions.

The Directive presents difficulties for European legislators because its main features must be superimposed, to the same level of rigour, on 12 different and complex constitutional, legal, and administrative systems and applied to a wide range of industrial activities and resource development. The Commission has proposed the creation of a European Environment Agency to supply Member States with information on improved ways to deal with environmental issues, the preparation and implementation of the legislation, better forecasting methods, and assurance that European environmental programs are integrated into international programs.

The effectiveness of environmental assessment in the European Community varies widely from one country to another, depending on the degree to which the Directive has been implemented. Effectiveness of enforcement depends to some degree upon the legal system of the particular nation, and vast differences have been identified. Given the number of legal systems to which this scheme has been applied, it is also difficult to gauge the regime's effectiveness at any specific point in time.

The Council of Ministers has emphasized the desirability of uniformity in European environmental assessment. Considerable differences between the requirements in Member States would have unacceptable effects on investment and competition. The EC Commission was convinced that Member States must agree on the principles to be followed. Arguably, uniform implementation of requirements is even more essential, but the Member States were left free to introduce the principles into their existing law and practice as they chose.

According to the EC Commission itself, the Directive as agreed upon is weaker in certain important respects than the original proposal. The Commission suggests, however, that the adoption of the Directive and its implementation constitute very substantial advances toward the ideal situation, which is described as being one where concern for the environment will be an integral part of good planning and management.(2)

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(2) *European Environmental Yearbook*, Achille Cutrera, Director, DocTer International U.K. Inc, London, 1987, p. 168.

In Belgium, the EC Directive is to be implemented by permit-granting authorities at the regional level of government and has not been enacted on a federal level. Nor is environmental impact assessment subject to regulation by the legislature in Denmark, where environmental impact is assessed on a local level through the town planning process. The EEC scheme is intended to be adopted in Denmark, however, and draft legislation to this effect has been introduced.

In France, legislation has been passed creating two levels of environmental assessment, Reviews for smaller projects, and Environmental Impact Studies for larger ones. A Government Decree includes 33 classes of projects which would require the latter type of enquiry. France was the first European country to require EIAs by statute, and about 10,000 are done annually, but they are criticized because the quality of study is often poor, procedures are difficult to follow, and only lip service is paid to public participation. The system is also criticized because it allows for fairly extensive exemptions, including maintenance and repair work of a certain size, the management, development and exploitation of forests, and those works with a budget of less than 6 million francs, unless specifically included in another list. This has led critics to observe that no strictly ecological criterion has been adopted, and that differences in various environmental risks have not been taken into account.

In the Federal Republic of Germany (FRG), three bills were introduced to make the EC Directive into law, and to amend existing related legislation. This step followed a period of debate after the introduction of the EC Directive at the Community level. The previous federal legislative scheme in the FRG was based on the American system, and had been in place since 1971. Its lack of definite qualitative standards and the procedural provisions, however, led to clear political pressure for improved environmental protection legislation; in particular, the "Green" party had called for environmental assessment legislation. As of the unification of the Germanies, on 30 October 1990, all West German legislation became applicable throughout the unified Federal Republic of Germany. Because industry in what was East Germany is behind in terms of

environmental protection measures, the enforcement of environmental legislation will be implemented gradually.

The *Bundesrat*, which represents the states of the FRG, has accepted, in principle, the proposed legislation, which, when passed, will serve as a framework for application by state governments. The effect of the new legislation will be to integrate environmental impact assessment into existing administrative procedures. All projects in Annex I of the EC Directive will require an EIA, as will most in Annex II. EIA will be applied to licensing and to broader planning procedures. A federal EIA coordinating agency will be created to assemble information and to report on the impact of projects. This report will serve as the basis for decisions by planning authorities. The legislation sets minimum standards for public consultation.

Legislation that would introduce an EIA licence requirement for new projects, programs and schemes within a federal legislative scheme is now under consideration in Greece. The Ministry for Environmental Protection, Regional Planning and Public Works, and the consent-granting ministry, would be responsible for the EIA.

In 1988, a statutory procedure for environmental assessment was enacted in the United Kingdom. The previous system had been part of a decision-making process which required authorization of proposed projects by central and local government under land use planning legislation. EIAs must now be conducted by proponents of projects included in Annex I of the EC Directive, while the local planning authority decides whether a project in Annex II must be assessed. The local planning authority, relying on the EIA and other planning materials, makes the final decision as to whether the project proceeds.

Work in the U.K. has pointed to a weakness in the British EIA scheme which could be identified in most of the systems examined here. As a stationary "snapshot" of the design history of a project, an Environmental Impact Statement (EIS) is of limited value in a dynamic situation.(3) To accommodate project change, and to update the nature of

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(3) B.D. Clark *et al.*, "Environmental Assessment Audits in the U.K.: Scope, Results and Lessons for Future Practice," in *Audit and Evaluation in Environmental Assessment and Management: Canadian and International Experience*, Vol. II, Minister of Supply and Services Canada, 1987, p. 537.

environmental impacts expected, the EIS would be more effective if it were adaptive to its context. This would require continual updating to keep track of impacts and to follow the links between project characteristics and environmental impacts.

The 1985 EC Directive has not been implemented and is likely to prove difficult in Ireland, which has very little environmental assessment experience or expertise.

In Italy, a 1988 Presidential Decree sets out EIA procedures for projects in the Directive's Annex I. Developers must send project descriptions and EIA studies to the Ministers of the Environment and of Cultural Heritage, and to the affected regions. The public must be informed in the press, and a copy of the EIA study must be available for public consultation at an approved regional office. A technical assessment of the EIA study is conducted by an EIA Commission, and a decision must be issued by the Ministers of Environment and Cultural Heritage within 90 days. Other approvals may also be required before the project may proceed.

The Dutch Parliament approved EIA legislation on the same day as the EC Directive was passed, 27 June, 1985. As part of the Dutch government's environmental policy, the purpose of EIA is to ensure that in preparing and making a decision, environmental aspects are taken into full consideration.(4)

In the Netherlands, EIAs are required for classes of developmental and industrial projects and plans specified on a list that includes all undertakings in the EC Directive's Annex I and most in Annex II. An EIA Commission comprising 200 experts in environmental and related areas works with the competent authority and the proponent of the project to determine the scope of the EIA. The proponent prepares the EIS and submits it, with input from the public and the EIA Commission, to the competent authority, which decides if the project should proceed, or if it needs mitigating measures or monitoring. Government and public agencies are permitted to appeal the decision.

The following criteria were used in the Netherlands to determine which activities required an EIA:

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(4) H.C.G.M. Brouwer, "Evaluation of Public Involvement in Project EIA in the Netherlands," in *Audit and Evaluation in Environmental Assessment and Management: Canadian and International Experience*, Vol. II, Minister of Supply and Services, 1987, p. 544.

- possible discharge of toxic or other substances, in large quantities, into the air;

- possible accidental discharges of flammable, explosive, toxic or radioactive substances which might seriously affect human health;

- possible discharge of waste material or non-ionizing or ionizing substances into ground or surface water;

- possible damage to soil;

- possible climatic changes;

- possible serious injury to the diversity, coherence, visual manifestation or cultural-historical aspects of towns and countryside;

- possible harm to the biotic environment whereby species or ecosystems, especially those which are unique or rare, are threatened with disappearance; and

- possible harm to the quality of the environment (i.e., causing noise, odours, unsightliness, or hazardous conditions).

In the Netherlands, it was decided to gain experience with environmental impact assessment on an experimental basis. EIAs have therefore been conducted on a voluntary basis for a number of government projects. Public involvement is included in the EIA process at two stages: the "scoping phase," where it is decided whether an EIS is required; and the review phase, where the EIS has been accepted by the competent authority but before a decision on the project has been made. Note that the proponent and the competent authority may be one and the same.(5) In the Netherlands, experience with public involvement in the EIA process has suggested that its effectiveness depends on the attitudes and behaviour of politicians. If the information derived from public participation is not permitted to affect decisions, public participation will be an empty exercise. The Netherlands is the only EC country to have a program of participant funding.

The provisions of the environmental assessment scheme under the EC Directive do not give individual Ministers (or other elected

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(5) *Ibid.*, p. 544.

representatives) the power to order public reviews of projects or of decisions. The scheme thus has the same weakness as has been identified in the environmental assessment scheme proposed in Bill C-78, the *Canadian Environmental Assessment Act*. It should be noted that no European country uses mediation as a means of resolving environmental assessment issues, an option proposed in Bill C-78.

LEGISLATION IN OTHER EUROPEAN COUNTRIES

A. Norway

A new EIA process was established in Norway on 6 June 1989. Its purpose is to ensure assessment of possible impacts on the environment, natural resources and society in the form of major physical developments or changes in land-use patterns. Classes of projects requiring EIA are listed in the regulations, and the Minister of the Environment may also designate special cases. There are two phases of the process, including screening and an EIS for proposals requiring in-depth study.

The proponent must notify the Minister of the Environment of each project in a class included on the list and in its report must identify the possible environmental impacts. The Ministry circulates the notification for comment to government agencies and the public, and then determines if the project may go ahead or if an EIS is required. In the latter case, the Minister issues specific guidelines to the proponent, who then prepares the EIS and submits it to the Ministry. The EIS is distributed for technical review before a public hearing is held. Once the Ministry decides that the EIS meets its guideline requirements, it issues a Notice of Approval.

B. Switzerland

Under a 1983 statute, project proponents in Switzerland must do an EIA report for project classes identified by the Federal Council. The report must be in accordance with the guidelines set by the environment

agency of the canton or the EIA Handbook of the Federal Office of Environmental Protection (OEP). A pre-assessment identifies any negative environmental issues, which are then studied in detail, according to the EIA Handbook. The proponent submits the EIA report to the federal EIA Agency, which coordinates reviews by the OEP and other authorities, decides whether or not the project should proceed, and informs the public.

NEPA - ENVIRONMENTAL PROTECTION LEGISLATION OF THE UNITED STATES OF AMERICA

The U.S. *National Environmental Policy Act* (1970) was a congressional response to continuing pressures for the creation of an agency that would give an overview of environmental protection and conservation efforts, and permit the integration of existing environmental protection programs. This legislation has been considered by some to be a new "environmental Bill of Rights"; others have criticized the scheme, saying that its effectiveness is restricted to compelling full disclosure of environmental impacts.

A. The Process under NEPA

The important operational provisions of the bill are contained in section 102, which provides a congressional directive that policy, regulations and laws of the United States are to be interpreted and administered in accordance with the policies of the *National Environmental Policy Act* (NEPA). All agencies of the federal government are required under the section to apply a "systematic interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment."(6)

Agencies are instructed to develop methods and procedures, in consultation with the Council on Environmental Quality, which would

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(6) NEPA, s. 102(2)(A).

bring "presently unquantified environmental amenities and values"(7) into consideration in the decision-making process, along with economic and technical matters.

Finally, section 102 provides that every agency must include in every recommendation or report on proposals for legislation and other major federal actions that would significantly affect the quality of the human environment, a detailed statement on the environmental impact of the proposed action; any unavoidable adverse environmental effects; alternatives to the proposed action; the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity; and any irreversible and irretrievable commitments of resources that would be involved in the proposed action.(8)

The responsible official is required to consult with any federal agency that has jurisdiction or expertise with respect to any environmental impact involved. Administrative agencies are required to develop alternatives to a recommended course of action in any proposal with unresolved conflicts concerning alternative uses of available resources. Agencies are directed to consider the worldwide and continuing nature of environmental problems, and to cooperate with international programs in improving environmental quality worldwide. Agencies are also instructed to provide advice and information services to government agencies, state and local, and private organizations and to monitor and evaluate their environmental protection activities on a continuing basis.

B. The Council on Environmental Quality

Sub-chapter II of NEPA establishes the Council on Environmental Quality and provides for its powers and duties.(9) The President is required to transmit to the Congress an annual environmental quality

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(7) *Ibid.*, s. 102(2)(B).

(8) *Ibid.*, s. 102(2)(C).

(9) *Ibid.*, ss. 201-207.

report which is to contain an inventory of the environmental assets of the nation, a projection of the trends in the environmental area, and recommendations for programs and legislative initiatives. The Council on Environmental Quality (CEQ) is part of the Executive Office of the President, and is to advise the President in the preparation of this report by reporting at least once a year to the President on the state of the environment.(10)

A 1977 Executive Order empowered CEQ to issue regulations to federal agencies for the implementation of the procedural provisions of NEPA, including those governing the preparation of Environmental Impact Statements required by section 102(2)(C) of the Act. Those regulations were promulgated in November 1978, and federal agencies must comply with them unless compliance would be inconsistent with statutory requirements.(11) An EIS, addressed to the Environmental Protection Agency, must be submitted whenever federal agencies make recommendations or propose legislation, or whenever they are about to engage in major actions that might significantly affect the quality of the environment.

Although CEQ has been seen to be effective in a variety of coordinating and information functions, the CEQ has no power to direct specific actions by any federal agency, nor does it have the power to compel an agency to file an EIS. Nor can it reject an inadequate or incomplete EIS, although it has sometimes commented on an incomplete statement. The Act has been found to fall far short of creating a body with the "ombudsman function" that proponents had called for in earlier proposals.(12)

C. Procedural Regulations

Several features of the 1978 regulations on NEPA procedures have influenced the effectiveness of the NEPA scheme. Lead agencies are

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(10) Frank P. Grad, *Treatise on Environmental Law*, Vol. 2, Matthew Bender & Co., New York, 1989, p. 9-13.

(11) *Ibid.*, p. 9-15.

(12) *Ibid.*, p. 9-18.

encouraged to set time limits on the NEPA process, to cooperate with other agencies with overlapping jurisdiction, to integrate the NEPA process into planning at the earliest possible stage, and to avoid repetition of material common to many actions.

The "scoping" process introduced in the 1978 regulations is intended to define the scope and emphasis of the EIS in advance of its preparation, to help identify environmental review requirements imposed by laws other than NEPA, and to allocate responsibilities among cooperating agencies. Affected agencies and the public must be invited to participate in the scoping process.

D. The Requirements of Environmental Impact Statements

An EIS is required in every instance that involves "major federal actions significantly affecting the quality of the human environment."(13) The line between major federal action and less-than-major federal action remains unclear. In some instances, Congress has indicated that a certain activity does not involve a major federal action by including in legislation a specific provision making reference to NEPA.(14) "Major federal action" is defined in the regulations issued by the CEQ to include actions with effects that might be major and that are potentially subject to federal control and responsibility. "Major" is defined to reinforce but not necessarily to have a meaning independent from "significantly," and "significantly" is defined to require both consideration of the context of the action and the intensity of its impact. Factors to be considered in evaluating "intensity" (i.e., the severity of the impact) are listed; they include effects on public health, the unique nature of the area affected, the extent of controversy about the effects, the extent to which the action may establish a precedent, effects on threatened or endangered species, and any violation of other environmental protection law.

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(13) NEPA, s. 102(2)(C).

(14) Grad (1989), p. 9-46.

An EIS is also required in any recommendation or report on proposals for legislation. The term "action" is defined in the regulations as including new and continuing activities; projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency regulations, policies or procedures; and legislative proposals, excluding funding assistance by revenue-sharing funds over which there is no agency control.

In determining whether a relatively minor activity "significantly" affects the environment, the issue of its "cumulative impact" has been examined. This means its impact when added to that of other past, present and reasonably foreseeable future actions.

E. The Threshold Determination

The requirement that an EIS be filed for these major federal actions raises a threshold question of whether the proposed action will have a significant impact on the environment; this question must be answered before the procedures under section 102 are carried out, though there is an obvious difficulty in doing so before the agency has had an opportunity to look into all the consequences of the action through the section 102 process. Determinations of agencies have been held to be susceptible to court intervention only if the decision to proceed without an EIS was arbitrary, capricious or contrary to law. This meant that the decision had to have been based on a reviewable record and that the public must have been given an opportunity to have notice and be heard.(15)

Other tests for the threshold determination have been declared by the courts, including the "rational basis test,"(16) and the holding that a full evidentiary hearing ("de novo") may be required if the record before the agency is considered inadequate.(17)

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(15) *Hanly* v. *Kleindienst*, (1973) 409 U.S. 990, cited in Grad (1989), p. 9-56.

(16) Grad (1989), p. 9-61.

(17) *Ibid.*, p. 9-59.

Section 101(a) of NEPA requires that the EIS include social, economic and other non-physical impacts; priority has been given to economic factors. The courts have generally held that there must be some physical impact on the environment in order for an EIS to be required; neither psychological nor socio-economic impacts in themselves have been sufficient. The impacts of projects involving designated historic sites or identified archaeological sites must be considered by federal agencies, and will necessitate an EIS.

F. Legislative Proposals

Section 102(2)(C) requires an EIS to be filed with each report or recommendation of a proposal for legislation. It has been suggested that there is little evidence that NEPA has had any significant effect on the legislative process. To date, almost every EIS has supported legislative plans of action, and has involved administration plans to improve the environment; few have been filed in connection with legislation that may have adverse effects on the environment. Thus far, no court has invalidated legislation on the grounds that the EIS has not met requirements. Budget reports and appropriation requests have conclusively been held not to be "proposals for legislation."(18)

Of the numerous cases examined, actions which have been held to merit an EIS include: highways; power plants; public water works projects; urban renewal and housing projects; pesticide or herbicide projects; transportation projects; public institutions and buildings; and projects resulting in job elimination.

For complex projects of very major scale, whose impacts are best considered together rather than through a separate EIS for each of the various parts, the concept of Program Impact Statements has arisen. This term does not appear in NEPA, but it has been developed to streamline the reporting of complex projects involving the impacts of various components

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(18) *Ibid.*, p. 9-80, referring to *Andrus* v. *Sierra Club*, (1979) 442 U.S. 347.

of the major action. Program Impact Statements have been advocated as a means of raising environmental factors at an early stage of agency policy-making. However, in *Kleppe* v. *Sierra Club*, the U.S. Supreme Court held that an EIS is required only where an action is proposed for a particular region, and that any report must be current as at the date of the proposal (i.e., the EIS should not precede the formalized proposal).(19) This ruling virtually defeats the intended purpose of Program Impact Statements, as it renders it impossible to include environmental impact considerations early in the planning process of a multi-pronged project or policy proposal.

G. Filing and Publication of Statements

The regulations under NEPA have divided the filing process into two parts: an initial filing of a draft EIS, which is to be circulated for comment; and the subsequent filing of the final statement. The final EIS, along with comments and responses, must be filed with the Environmental Protection Agency (EPA) at the same time as it is transmitted to commenting agencies and made available to the public. The EPA publishes lists of statements received in the Federal Register. Each agency also has a responsibility to ensure that the public is fully informed that the EIS is available for comment.

Any comments received by the agency must also be made public. No administrative action of the type subject to the EIS requirement may be taken before 90 days after the draft EIS has been circulated for comment and sent to the EPA. After the final EIS is sent with comments to the EPA, other agencies and the public, there is also a limit of 30 days before action may be taken. An agency may shorten the total time period, however, by filing the final EIS before expiry of the initial 90-day period. These arguably liberal time limits are constricted by the time sequence required for public participation, and they can be manipulated by an agency wishing to forestall public involvement in the evaluation process and its attendant delays.

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(19) (1976) 427 U.S. 390, cited in Grad, p. 9-107 - 9-115.

H. The Effectiveness of the Environmental Assessment Regime of NEPA

The NEPA does not create an environmental Bill of Rights, nor does it create any new substantive or procedural rights. Throughout numerous instances of judicial interpretation of the Act, the courts have rejected litigants' efforts to find in it a basis for private, substantive rights of action. NEPA does, however, provide the following new bases for review of administrative actions, thereby creating new rights.

1. Procedural aspects of NEPA: The courts have included in their review function an examination of whether the procedural requirements of NEPA had been fully met, and will compel compliance with the Act's procedural requirements. However, the courts have generally abstained from their making a determination on the merits of a project, on the basis that the agencies are best qualified to do so.

2. The decision to proceed with a project: NEPA is not a decision rule; this means that a court cannot rely on NEPA to prohibit the agency from proceeding with a project. The demonstration of negative environmental impact may, however, provide political ammunition against a project, or it may dissuade an agency from proceeding, or it may even provide a basis for preventing the project under some other legislation. Nor will the courts impose mitigation requirements on agencies proceeding with projects.

3. New procedural rights:

(a) Standing - all persons have been held to be within the zone of interests protected by NEPA, meaning that an interested person or group need only show injury to aesthetic and environmental values, even though such injury may be small or remote, as long as it gives the person a direct stake in the outcome of the litigation and adequately distinguishes that person from one with a "mere interest in the problem."(20)

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(20) *United States* v. *SCRAP*, (1973) 412 U.S. 669, cited in Grad (1989), p. 9-236.

Standing was denied where the plaintiffs asserted prior uses of privately owned highland areas; it was held there was no injury, such as would give the individuals standing, due to any impairment of their use of the highlands.(21)

The question of whether a purely economic interest should enable a party to have standing to make a case under NEPA has been discussed in a number of cases, in a few of which standing was refused because the plaintiff's injury was purely economic. In one case, a plaintiff's NEPA case was characterized as "spuricus" because his primary intent was to protect his business rather than the environment.(22)

(b) Remedies - Injunctions - The Act contains no reference to remedies. There is no indication in NEPA of what will happen if an agency fails to comply with its provisions. However, this has not presented a problem to plaintiffs or to the courts; injunctions have invariably been the remedy sought, and frequently granted. In an action for an injunction, where the plaintiff can show that the action meets the statutory requirement of "major federal action having significant impact on the environment," and no EIS, or an inadequate EIS, has been filed, an injunction will be issued almost invariably, as being the only possible remedy to prevent possibly irreversible harm to the environment.

The question has also arisen of what remedy is appropriate where the agency has failed to comply with commitments made in its EIS. The courts have answered this question in several ways, including damages and mandamus orders. They have had difficulty determining their power to grant remedies and have called for a legislated solution.(23)

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(21) *Conservation Council of North Carolina* v. *Constanzo,* (1974) 505 F.2d 498, cited in Grad (1989), p. 9-237.

(22) *Piritz* v. *Volpe,* (1972) 467 F.2d 208, cited in Grad (1989), p. 9-244.

(23) Grad (1989), p. 9-250.

(c) Defences - Most cases decided under NEPA have turned on an application of the substantive issues under the Act. Defendant agencies have not had much success in relying on such defences as sovereign immunity, laches, and ripeness or exhaustion of administrative remedies. The laches defence has been successful in cases where the project was so near to completion that compliance with NEPA would not have been effective in preventing harm to the environment.

4. Extra-territorial Application: The courts are generally moving in the direction of applying NEPA to international projects carried out by American agencies, and to projects having extra-territorial effects. Although the courts have applied NEPA to many projects abroad, few have handed down rulings.

5. "Little NEPAs": Many states have enacted environmental protection statutes which closely parallel NEPA and have accordingly been called "little NEPAs." Because of the similarity of the Acts, judicial interpretation of state legislation has been applied to NEPA, and vice versa. This could result in the expansion of the scope of NEPA. For example, the California courts have allowed that state's *Environmental Quality Act* the broadest possible interpretation, and have included in its scope regulated private activity, ongoing projects (where commercially feasible to do so), and major modifications.(24)

I. General Remarks

Commentators have concluded that NEPA has been an unexpected success story, having had much greater impact than was probably intended by its drafters and Congress in 1970, when it was passed. Even on its face, NEPA is an unlikely statute to have so significantly changed the administrative procedures of agencies, the relationship of courts to federal agencies, and the relative power of public interest groups and government.(25) The degree of change is surprising because the Act is almost

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(24) *Ibid.*, p. 9-314.

(25) *Ibid.*, p. 9-285.

completely lacking in administrative machinery. Its operational provisions are inadequate to fulfill its statements of policy, and the Act did not create any authority to enforce the obligations it imposed on federal agencies.

Supporters of the NEPA scheme of environmental assessment have commented that "NEPA has brought the technical precision of science to bear on resources decision making"; that NEPA has "imported environmentally sensitive officials into previously insensitive bureaus"; and that NEPA has "opened up otherwise parochial agency decision processes to the cleansing light of public scrutiny and review."(26)

Paul Culhane, in his study of the accuracy of EIS forecasts, reviewed the NEPA experience for accuracy in predicting impacts and the degree to which the process has in fact brought the "technical precision of science" to bear. Like academics, public and inter-agency commentators and judges, he noted that EIS forecasts were often too vague even to allow their accuracy to be gauged.(27) While very few impacts turned out to be inconsistent with the forecast, only about a third of the forecasts are said to have been "tolerably accurate." Culhane concluded that probably the best result of NEPA is that federal agency decision-making has been opened to public and inter-agency scrutiny.

NEPA's effectiveness has arisen from the willingness of the courts to treat the Act as the starting point for weighing the competing claims of development and environmental interests. However, the environmental assessment process that has evolved is cumbersome, time-consuming and expensive. Over 20 years of experience with NEPA have clearly forced agencies to become more aware of the environmental impacts of their activities; however, it remains unclear whether they are making more environmentally sound decisions.

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(26) Paul J. Culhane, "Decision Making by Voluminous Speculation: The Contents and Accuracy of U.S. Environmental Impact Statements," in *Audit and Evaluation in Environmental Assessment and Management: Canadian and International Experience, Volume II*, Minister of Supply and Services Canada, 1987, p. 357.

(27) *Ibid.*, p. 375.

Concern that agencies have learned to prepare an EIS routinely for their projects has led commentators to suggest that the statements fail to meet their objective of a clear, fresh look at a project in the light of its environmental consequences. Many also question the effectiveness of an environmental assessment system that creates such profuse litigation; in 1975 alone, there were 30,000 administrative actions to determine the need for an EIS.(28)

ENVIRONMENTAL ASSESSMENT LEGISLATION OF COUNTRIES OF THE PACIFIC RIM

A. Australia

The *Environment Protection (Impact of Proposals) Act* (1974) and its Administrative Procedures (1975) apply to Commonwealth of Australia (Commonwealth) projects, state projects directly funded by the Commonwealth, and all state or private projects requiring Commonwealth approval.(29) Commonwealth agencies decide on the significance of their own projects' environmental impacts. If there are deemed to be no harmful effects, the project is permitted to proceed. If the Action Minister judges there may be significant harmful impacts, the project is submitted to the Minister of Environment and Development. The Department can decide there is no need for an EIS, but only the Environment Minister, using criteria in the Administrative Procedures, can order that one be prepared.

The project's proponent and the Department of Environment and Development determine the contents of the EIS. The Minister may decide to make the draft EIS available to the public and to set up a Commission of Inquiry, which arranges for the technical review of the EIS and holds quasi-judicial public hearings. The Commission submits a report on the review to the Minister, who must provide a copy to the proponent. The proponent must revise the EIS and submit final copies to the Department,

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(28) Grad (1989), p. 9-291.

(29) An Act of the Commonwealth is akin to a federal statute in Canada, with regulations passed pursuant to it.

the Commission, to any Department or person who made written comments, and to the public. The Department, or the Minister, may make suggestions or recommendations to the Action Minister or the Department concerning the proposal and mitigating measures. All ministers and their departments must ensure that the EIS and related recommendations are taken into account while the project is carried out.

The Minister may exempt a proposal when the procedure would be prejudicial to national security or interests, affect confidence on commercial or other interests, or would be contrary to the public interest. There is nothing in the Australian system comparable to panels, mediation or participant funding.

The application of the EIA process in Australia is largely within the discretion of the minister responsible for the particular department with control over the proposed activity.(30) The minister of the federal environment department does not decide whether or not the process will be applied, but where it is applied, the process is administered by that department, there being no separate agency such as FEARO.

The Australian legislative scheme of environmental assessment was not intended to be subject to judicial review. The Australian government did not wish to repeat the American experience under the *National Environmental Policy Act* (1970) ("NEPA"), which was perceived to have caused a flood of litigation.(31) There are no provisions in the Australian Act giving "ordinary citizens" standing to challenge government actions or to enforce the Act. The courts have limited standing to narrow classes of persons, such as those having more than a mere emotional or intellectual interest, which has meant those having a financial interest. This makes it difficult or impossible for interested groups or individuals to resort to the courts to protect environmental objects by restraining government action.

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(30) Ben W. Boer and Donna Craig, "Federalism and Environmental Law in Australia and Canada," *Federalism in Canada and Australia: Historical Perspectives, 1920-88*, Frost Centre, Peterborough, 1989, p. 307.

(31) *Ibid.*, p. 308.

The constitutional framework has served to weaken or discourage federal legislative initiatives in Australia, since pollution control and environmental protection measures have been within the constitutional competence of the state governments. The first federal statutes relating directly to the environment were enacted by the Labour Government, starting in 1972.(32) These initiatives, which included statutes mandating the preservation of heritage areas in several states, have been upheld by the courts. These cases recognized that the federal government is able to extend legislative power beyond what had until then been considered legally possible.

Most of the Australian states have enacted procedures similar to those of the Commonwealth Government. The exception is New South Wales, where the *Environmental Planning and Assessment Act* (1979) links EIA to the state's land-use planning process. The Act makes three classes of projects, including designated (mandatory EIS), non-designated, and prohibited. A proponent must submit an EIS with an application for designated public and private projects to the decision-making authority, and the public must also be informed. Even for non-designated projects, it is preferred that the applications address environmental impacts. If there are potential adverse impacts, a project may not proceed until an EIS review. After receiving public objections, the Department reviews the EIS and reports its findings to the determining authority. The report is then made public. The Minister may require an inquiry into the project's environmental impacts and, when it is in the public interest, has the power to stop any project, designated or non-designated, and may require the proponent to follow procedures, including a public inquiry.

Critics of the planning system under this legislation in New South Wales have commented that its effectiveness has been hampered by the dominance of spot rezonings and ad hoc development control.(33) Unlike a

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(32) *Ibid.*, p. 109.

(33) J.F. Whitehouse, "Discretion in Environmental Planning: New South Wales Experiments," (1985-6) University of West Australia Law Review, Vol. 16, p. 292.

policy-based system, which makes clear the value choices involved in planning decision-making, the scope of this system is limited to reactive decision-making, which provides no guidance for the exercise of discretion in the development control process. This risk is inherent in a system which relies on the pre-existing land use planning regime.

New South Wales is the only Australian jurisdiction in which the EIA scheme could be interpreted as requiring the inclusion of social impacts in the scope of an EIA. The assessment of social impacts could not be said to have become a "focal concern" of Australian federal environmental policy, either directly or indirectly.(34)

B. Japan

In Japan, the Minister responsible for the Environment Agency reports to Cabinet through the office of the Prime Minister, and does not have a place at Cabinet comparable to that of the other Ministers. Although Japan has had stringent pollution-control laws since the early 1970s, efforts to pass an environmental assessment law have been thwarted by the powerful economic Ministries. Environmental assessment is done under Cabinet policy. Designated major projects require an EIA, and about 200 are done each year. The process is similar to that of the U.S. NEPA, but is less formal, involves less public participation, and is not accountable to the courts.

C. New Zealand

New Zealand's *Environment Act 1986* was introduced on 15 July 1986 and is now in effect. New Zealand is clearly a world leader in environmental assessment (EA) legislation; the new scheme provides an independent Parliamentary Commissioner for the Environment with powers to initiate investigations, order information and report to the legislature on any policy, program or project. EA is not done separately, but as part of the land-use planning system. There are no panels comparable to those in

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(34) Boer and Craig (1989), p. 313.

Canada, but regional authorities may hold hearings. A prominent position is given to the rights of aboriginal people.

The scope of the Act includes:

(1) all government departments' works and policies which may affect the environment;

(2) all private actions which may affect the environment, if financed in whole or in part by the government;

(3) all statutory boards, corporations and commissions' works and policies which may affect the environment; and

(4) the granting of licences, permits and authorizations pursuant to one of 16 specifically enumerated Acts, and other Acts as determined by the Minister for the Environment by agreement with the Minister responsible for the legislation in question.

The EIA process also applies where statutory consents are being sought under the *National Development Act*. Every application must be accompanied by a statement of the economic, social and environmental effects of the proposed work, and an Environmental Impact (EI) Report (EIR) and Audit are mandatory requirements in the event that an application is successful. Five other pieces of legislation, including Acts related to clean air, soil, water and public works, are listed, and where consents are sought under one of these, documented information on the environmental implications of the proposal may be required.

EIA is described as a process whereby a conscious and systematic effort is made to assess the environmental consequences of various options which may be open to the decision-maker, including the option of doing nothing. It must begin at the inception of a proposal, when there is a real choice between various courses of action. EIAs are to:

(1) determine the environmental impact of possible actions in order to enable a choice to be made between various options;

(2) determine whether or not the possible actions would affect the environment significantly and would require the preparation of an environmental impact report; and

(3) determine whether or not any measures should be taken to improve the environment, minimize or avoid damage to it in the course of developing or implementing a proposal, irrespective of whether or not an environmental impact report has been or is to be prepared.

The costs of a project's environmental implications are to be included in the estimates and costs of a proposal.

An EIR is a written statement describing the ways of meeting a certain objective (or objectives) and their environmental consequences. It must set out, with supporting documentation, the environmental consequences of a proposed action and of the alternatives to it, and ways of avoiding or alleviating any harmful environmental consequences. Normally, it is the responsibility of the promoting organization to prepare the EIR and a series of 12 questions are prescribed for its guidance. The issues to be covered include the effect on the physical area; the existing communities; living conditions or quality of life; plant or animal species; scenic, recreational, scientific or conservation values; stimulation of further developments; and historical or archaeological areas or structures. Substantial public interest, the project's demands on resources, and pollution problems are also to be considered.

If a Department does not propose to prepare an EIR, but the Commission for the Environment believes that one should be prepared, the Minister for the Environment may so direct. Notice of intention to prepare an EIR, including a short written description of the proposal and an initial assessment of its environmental impact, must be given to the Commission for the Environment in writing by the Government agency or organization. The Commissioner for the Environment may issue public notification of the information. The EIR should be prepared in sufficient time to ensure that all processes, including audit by the Commission for the Environment, are completed before the deadline for a decision by the authority that would commit resources to the proposal. The Act includes provisions for publication of notices regarding a completed EIR, and for calls for submissions from the public.

On the authorization of the relevant Minister, the EIR must be forwarded to the Commission for the Environment for audit. An EI audit is the document providing the Commissioner for the Environment's independent opinion on the environmental implications of the proposal. Where a proposal which has been the subject of an EIR is submitted for approval, it must be accompanied by the audit. If approved without

conditions, the project is implemented by the proponent, who is responsible for ensuring that the environmental provisions are adhered to. If conditions have been attached to the approval, the responsible department must discuss with the Minister for the Environment how they are to be observed.

The Commissioner for the Environment, who is appointed by the Governor-General, is independent of the Parliament (i.e., must not be a Member of Parliament or of any local authority). His or her powers include that of requiring anyone to furnish information or documents related to an investigation, and to summon individuals before the Commission. The Commissioner may, at the request of the House of Representatives, report on any bill whose subject matter might have an effect on the environment, or any matter which might have a substantial and damaging effect on the environment.

No participant funding is provided in the New Zealand scheme. A Schedule listing 21 statutes is attached to the Act, and the definition of "consent" makes specific reference to consents, authorizations or permits sought pursuant to one of the enumerated statutes.

COMPARISON OF INTERNATIONAL SCHEMES WITH THE PROPOSED CANADIAN SCHEME

In order to determine the effectiveness of the environmental assessment regime proposed for Canada in Bill C-78, it is useful to compare each of its elements with similar provisions of schemes in other countries, and the extent to which those provisions have proved effective. Of course, many of the features examined here will be considered positive by some observers, but negative by others. No clear answer, in terms of which legislation is "best," can easily be found.

Almost all the legislative schemes outlined and reviewed here contain some element which would improve the effectiveness of the legislative regime proposed for Canada. The following analysis will compare specific types of provisions in environmental assessment legislation, and make some general observations.

A. Scope

All the environmental assessment regimes examined here are legislative ones, with the exception of some in countries of the European Community that have not yet implemented the European Directive, and that in Japan. This is particularly interesting, given that a legislated scheme will be a new development for Canada. Until Bill C-78 (or any successor proposal) is passed, Canada's federal environmental assessment process is governed by the 1984 *Environmental Assessment Review Process Guidelines Order* (EARP), which is a Cabinet Order in Council and not a legislative instrument. It has been held by the Federal Court of Appeal to have binding effect, however, similar to that of legislation.

The scope of the environmental assessment regime that would be established by the passage of Bill C-78 will not be determined until all the Regulations provided for in the bill have been formulated and passed. These Regulations will set out lists of projects for which mandatory assessments will be required, and lists of projects and acts which will be excluded from the process, because they will have negligible environmental effects, or involve national security, have minimal federal involvement, or are deemed to be activities for which assessment would be "inappropriate."

The definition of "projects" for which Bill C-78 would require assessment has been criticized as being too narrow. In fact, it refers to "physical activities," a term which is not defined, but which seems to preclude assessment of non-physical activities. The scope of NEPA, the American legislation, would seem to be broader because it requires an EIS in every instance that involves "major federal actions significantly affecting the quality of the human environment." "Major federal actions" are those whose effects may be major and those which are potentially subject to federal control and responsibility. There is no exclusion of non-physical actions.

Under Bill C-78, projects proposed or financed by a federal authority or requiring the transfer of federal land or some federal permit or licence would be caught. The scope of the Australian and New Zealand legislation is similar, although that of the New Zealand legislation is somewhat broader. Of the schemes in Australian jurisdictions, only that in

New South Wales could be interpreted as requiring the inclusion of social impacts. Policy decisions are expressly included in the triggers to assessment under the New Zealand legislation.

Bill C-78 would apply to those projects which are considered to include "statutory exercises of power by federal authorities," as listed in Regulations pursuant to section 55, and those not on the lists of exclusions. Transboundary effects can also be assessed at the request of the Minister of the Environment, or the request of a party. There are provisions for this type of specific inclusion and exclusion in most of the foreign legislation, as well. Under NEPA, the U.S. Congress can exclude certain activities by specific reference in other legislation. For example, the legislation establishing a major project could include the provision that the project is exempt from NEPA.

The EC Directive, which has been implemented to varying degrees by the Member States of the Community, covers two classes of public and private projects which are listed in two Annexes to the Directive. Those in Annex I must be included in mandatory lists in the legislation of the Member States, and those in Annex II should be assessed when Member States "consider that their characteristics so require." Member States can exclude projects listed in Annex II, but if they do so they must inform the EC Commission and the public.

The assessment of private projects under European legislation is an expansion of the scope of proposals in Bill C-78. Though NEPA has also been applied to some private activity, it does not contain any specific reference to it and nor does Bill C-78. NEPA's scope is broader than that of Bill C-78 in that it catches both policies and proposals for legislation. This results from NEPA's definition and interpretation of "action," which is much broader than the definition of "project" in Bill C-78.

The existing scheme in Canada, under the EARP Guidelines Order, applies to "projects having effects on areas of federal jurisdiction." Projects which would have been caught under this part of EARP may not be caught under Bill C-78, which can thus be seen as narrowing the scope of Canada's federal environmental assessment regime. Depending on

the level of implementation of the EC Directive by European Member States, this gap may or may not exist in the countries of the European Community, but it does appear to be present in the American system, which applies to "federal actions." Interestingly, however, NEPA may have been interpreted broadly enough to have closed this gap, in that it has been applied to private activity.

B. Environmental Factors to be Considered

Of the regimes examined here, only Bill C-78, NEPA and New Zealand's *Environment Act 1986* contain specific reference to "cumulative effects." The cumulative environmental effects of actions have been examined under NEPA, and Bill C-78 specifically includes them in the list of factors to be considered by review panels, mediators and in screening and mandatory study.

Since the report of the Brundtland Commission was released in 1987,(35) the words "sustainable development" have been seen as a prerequisite to the formulation of environmental protection policy and legislation. Many commentators on Bill C-78 have expressed the view that this concept should be reflected in the bill. Although the expression "sustainable development" does not appear in the legislation, drafters of the bill and the Minister himself have said that the bill's provisions represent an attempt to embody the principle, without contributing to confusion about its meaning.

The words "sustainable development" are not mentioned in the legislation of New Zealand, the United States, or Europe. In NEPA, although there is no specific reference to it, the concept seems to be present in the reference to the relationship between local short-term uses of the environment, and the maintenance and enhancement of long-term productivity, and irreversible and irretrievable commitments of resources. One of the functions of the Parliamentary Commissioner for the Environment

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(35) World Commission on Environment and Development, *Our Common Future*, Oxford University Press, U.K., 1987.

in New Zealand is to review the government's resource allocation and use systems with the objective of improving the quality of the environment: the list of "matters to which regard is to be given" is very broad, and covers all environmental effects, short and long term, direct and indirect, adverse or beneficial, or cumulative.

Although a desire to have the words "sustainable development" in the Canadian legislation has been expressed nearly unanimously by environmentalist commentators, others have questioned the value of including these words. *Our Common Future* makes a commitment to rapid economic growth in industrial and developing countries, and states that limits to economic growth are imposed only by the present state of technology and social organization. The report has been criticized as "fluffy environmentalism,"(36) and as being so anxious to accommodate industry and big business that it risks missing the critical need for change if we are to be protected from the looming environmental crisis.

Clearly, adoption of the terminology is not without controversy, and would not in itself ensure the effectiveness of an environmental assessment regime. Any adoption of the terminology must be accompanied by an understanding that we cannot fail to protect the environment even in the name of economic development; such an understanding would represent a real step toward the goal of "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."(37)

A crucial factor in this type of legislation is its definition of "environment." In Bill C-78, the term "environmental effects" includes both changes to the environment and effects on health and socio-economic conditions, but this definition is sufficiently narrow to exclude cultural impacts. It may be interpreted even more narrowly, given

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(36) Joyce Nelson, "Deconstructing Ecobabble," *This Magazine*, Vol. 24, September 1990, p. 14.

(37) J. Anthony Cassils, "Structuring the Tax System for Sustainable Development," *The Legal Challenge of Sustainable Development*, J. Owen Saunders, ed., Canadian Institute of Resources Law, Calgary, 1990, p. 141.

that the definition in the bill of "environment" is restricted to biophysical elements.

Under NEPA, factors to be included in evaluating the intensity of environmental impact include effects on public health, the unique nature of the area affected, and the extent of controversy about effects, which together could encompass more than just the biophysical environment. Section 101(a) of NEPA requires an EIS to include social, economic and other non-physical impacts, including protection of historic or archaeological sites. This is clearly much broader than the scope of Bill C-78.

The scope of environmental assessment under the EC Directive is also broader than that of Bill C-78. The Directive covers impacts on the biophysical environment, including human beings, flora and fauna, water, soil, air, climatic factors, the landscape, material assets and cultural heritage.

C. Process

Bill C-78, NEPA, and the EC Directive are all self-assessment models. This means that the government department primarily responsible for the initiative is also responsible, at least to some extent, for the environmental assessment. In the process proposed by Bill C-78, there would be three components: a screening or mandatory study determination; mediation or a panel review; and follow-up.

Under NEPA, agencies prepare the EIS according to methods developed in consultation with the Council on Environmental Quality (CEQ). The EIS is filed with the Environmental Protection Agency (EPA), but initiating agencies still have decision-making power. The courts cannot order the agency not to proceed with a project. There is no mediation or panel review, but there is frequent judicial review of administrative decisions. The courts have not really pronounced on the consequences of agency failure to comply with commitments made in the EIS, so the enforceability of any follow-up provisions is questionable.

In Europe, Member States who have schemes based on the EC Directive must have a process of self-assessment and public reporting

designed to incorporate environmental considerations in the planning process. None of the States' systems involves panel reviews or mediation. Monitoring may be provided in the Netherlands, but is not required elsewhere.

As part of the environmental assessment regime in New Zealand, regional authorities may hold hearings, but there is no panel review requirement. In Australia, hearings by a panel are not required, but the Minister of the Environment and Development may decide to set up a Commission of Inquiry to hold a quasi-judicial public hearing.

D. Who Decides?

Under Bill C-78, the review panel would submit a report to the responsible authority and the Minister of the Environment. The responsible authority would be required to act on the report by allowing the project to proceed, or prohibiting it from doing so where it considered that the environmental effects could not be justified or mitigated. However, if the responsible authority decided to permit a project to proceed, it would only have to ensure that those mitigation measures it considered appropriate be implemented.

In the U.S., the threshold determination is made by the implementing agency, and will be subject to court intervention only if the decision is capricious, arbitrary or contrary to law. The NEPA scheme is not a decision rule, which means that the final decision is within the agency's authority, the court cannot order the agency not to proceed with the initiative or order mitigation steps to be taken.

In the European Community, decisions are ultimately made by the local planning authority or the competent authority, rather than by an independent agency. Similarly, in Australia the Minister of the responsible department makes the ultimate decision, even after a Commission of Inquiry has reported.

E. Follow-Up

Under Bill C-78, the responsible authority would have to design the follow-up program and arrange for its implementation. However, there is no mention of enforcement of such a program, or any mitigation promises or requirements. There is no offence provision in Bill C-78, which would be one option for the enforcement of the requirement for a follow-up program and any commitment to perform mitigation measures. Such an enforcement provision is included in the *Canadian Environmental Protection Act* (CEPA), R.S.C. 1985, c. 16 (4th Supp.).

Implementing agencies in the U.S. are required under NEPA to monitor and evaluate their environmental protection activities on an ongoing basis. However, the enforcement capabilities of the courts are largely untested. On the other hand, commentators have noted the surprising effectiveness of the scheme, which has resulted mainly from active and widespread public concern, and the activism of the judiciary and environmental groups.

Specific mention of follow-up is missing from the EC Directive regime. Follow-up can be included in the Netherlands, but is not required. In other EC countries, government and public groups are permitted to appeal the decision of the competent authority, but there is little or no access to the courts. There is no specific provision for follow-up in the Australian system, while in New Zealand monitoring is the function of the Parliamentary Commissioner for the Environment.

F. Judicial Review of Decisions

One controversial element of Bill C-78 is the possibility for judicial review of decisions made pursuant to it. Because the bill is largely framed in mandatory language, such as the frequent use of the word "shall" where the word "may" might have been used, some consider that failure to fulfil obligations by the responsible authority or another decision maker would enable the courts to substitute their opinions. Critics of the bill, however, have underlined the use of the phrase "in the opinion of the responsible authority," which frequently follows the word

"shall" in the bill (e.g., section 16). The creation of such discretion in the responsible authority might prevent the courts from interfering with its exercise. Particularly in the light of judicial interpretation of the 1984 EARP Guidelines Order, it is difficult to predict how this phraseology will be interpreted by the courts.

As mentioned above, there is little or no access to the courts in countries of the European Community, with the exception of the Netherlands, while the legislation in Australia is specifically intended not to be subject to judicial review. The American legislation, NEPA, on the other hand, has opened the way to numerous reviews of administrative decisions, leading to what has been perceived as a flood of litigation.

Under NEPA, the courts have compelled compliance with the Act's procedural requirements, granted standing to individuals who could show injury even to aesthetic or environmental values as long as they had more than a "mere interest" in the problem, and have applied NEPA to many projects with extra-territorial effects. Because the Act's focus is on the litigation process, however, critics have charged that agencies are oriented solely to preparation of documents in anticipation of litigation, rather than towards incorporating environmental considerations in the planning process. It may be that agencies, while learning to avoid litigation and its costs, are not necessarily learning to avoid the environmental costs of unsound development.

G. Powers of the Minister

The Minister of the Environment under Bill C-78 would have no power to stop or cancel a project. He or she might issue guidelines and codes of practice, establish advisory bodies, enter into agreements with other jurisdictions, and appoint panel members and mediators. One recommendation by critics of Bill C-78 is that the Minister of the Environment should have the power to stop a project that is not complying with mitigation requirements or poses some other environmental hazard. Other critics have asked for this power to be vested in an independent authority similar to the Parliamentary Commissioner for the Environment in New Zealand.

Under NEPA, there is no equivalent to a Minister of the Environment, in that the agencies responsible for projects retain decision-making power. No individual government members are vested with the power to stop or cancel a project under the EC Directive, nor can any one Minister order reviews of projects or decisions.

New Zealand has established the office of the Parliamentary Commissioner for the Environment, who is independent of Parliament, and whose powers include those of requiring anyone to furnish information or documents, and of summoning individuals. The Commissioner may report on any bill whose subject matter might have an effect on the environment, or on any matter that might have a substantial and damaging effect on the environment. A Ministry for the Environment is responsible for ensuring that all legislation complies with the objectives of the *Environment Act 1986*, and for ensuring that adequate provision is made for public participation and the management of New Zealand's natural resources.

In Australia, the application of the EIA process is within the discretion of the minister responsible for the department controlling the project; the federal Minister of the Environment does not decide whether or not the process will be applied. In New South Wales, when it is in the public interest, the Minister of the Environment has the power to stop any project and may require the proponent to follow environmental assessment procedures, including the holding of a public inquiry.

H. Independant Agency

Bill C-78 would establish a new federal agency, the [illegible] Environmental Assessment Agency, to administer the environmental assessment process and promote research. The Agency would report to the Minister of the Environment.

In the United States, the CEQ, which is within the President's Executive Office, advises the President on the preparation of his annual report to Congress. The implementing agency sends an EIS to the EPA, which then publishes and circulates it.

A more independent form of agency exists in the Netherlands; the EIA Commission comprises 200 environmental experts, who work

with the competent authorities and proponents to determine the scope of the EIA, and to review it once it has been prepared by the proponent.

In Australia, there is no separate agency, the environmental assessment process being administered by the federal department of the environment. The New Zealand independent Commission for the Environment is the most powerful and independent model examined here. It audits EIRs and conducts hearings convened by the Parliamentary Commissioner for the Environment.

I. Annual Report

The Minister of the Environment would be required under Bill C-78 to table in the House of Commons and Senate an Annual Report on the activities of the Canadian Environmental Assessment Agency, and the implementation of the environmental assessment process. The Report would have to include a statistical summary of all environmental assessments.

In the United States, the President makes an annual environmental quality report to Congress, assisted by the CEQ. The Parliamentary Commissioner in New Zealand may be requested by the House of Representatives to report on any bill or other matter which may have a damaging effect on the environment. The Commissioner, regardless of other reports, must each year report to the House of Representatives on the performance of his or her functions under the *Environment Act 1986*.

J. Constitutional Division of Powers

Bill C-78 asserts the federal government's jurisdiction to legislate in the area of environmental assessment. Environmental issues are divided between areas of federal and provincial competency in Canada, but there would be clear authority for the federal jurisdiction over environmental issues as claimed in the form of Bill C-78. Federal constitutional bases for authority over environmental assessment include the following:

(1) trade and commerce;
(2) criminal law;
(3) seacoast and inland fisheries;
(4) Indians and lands reserved for Indians;
(5) federal spending;
(6) federal property; and
(7) peace, order and good government.

The peace, order and good government power may be the most important of these, as it allows the broadest federal jurisdiction, and may permit the most far-reaching and effective environmental protection legislation. Some critics of Bill C-78 have suggested that the constitutional bases for the bill be set out in its preamble.

NEPA applies to federal agencies only. It has, however, been influential with regard to the environmental assessment regimes of the states, most of which have passed legislation based on NEPA.

In the European Community, the EC Commission has no authority to legislate within the Member States, who are, however, compelled within certain time limits to pass legislation based on the Directive passed by the Council of Ministers. The Member States will modify the legislation somewhat in terms of form and method of implementation.

For the most part, the constitutional framework in Australia has served to weaken the Commonwealth's jurisdiction over environmental protection. However, the Australian federal legislature has successfully extended its jurisdiction to enact environmental assessment legislation similar to that of the U.S. New Zealand's constitutional jurisdiction is similar to that of Australia.

K. Public Participation

Where a project is to be approved after screening, and not referred to a panel or mediation, the responsible authority has to provide the public with an opportunity to comment on the screening report. Under NEPA, agencies affected and the public must be invited to participate in

the "scoping" process, whereby the scope of the EIS is defined before the EIS is prepared. Also, the public has a right under NEPA to notice and a hearing on the "threshold determination," of whether the action will have a significant impact. The EC Directive requires that the public have an opportunity to express concerns before the project starts, and to be informed about all decisions made as the project is undertaken.

If public concern warrants, Bill C-78 would require the responsible authority to refer the project to the Minister of the Environment for referral to a panel or mediation. When a mandatory study was conducted by the responsible authority, the report would be submitted to the Canadian Environmental Assessment Agency, which would publish a notice seeking public comment on the report. This comment would have to be taken into account by the Minister in deciding whether to refer the project to a panel or mediation.

Under NEPA, the EIS, once submitted to the EPA, has to be made available to the public, and any comments received by the Agency must be made public. As discussed above, the public has frequently initiated or been involved in litigation under NEPA.

Bill C-78 provides that the review panel would make any assessment information available to the public and hold hearings in which the public could participate. Its report would have to be made available to the public by the Minister. The public would also have to be informed of all decisions following the report, including mitigation measures, the extent of adoption of the panel's recommendations, and the follow-up program. A similar level of public participation is provided in New Zealand, with particular emphasis on the right of aboriginal people to participate.

Bill C-78 would also set a standard for public access to information after the project or its assessment was complete. Required would be a public registry containing information on each completed environmental assessment. In the United States, since so many projects and assessments are the subject of litigation, the opportunity for judicial review may provide an effective means of allowing effective public supervision of the process.

The highest level of public participation in Europe is that provided under the legislation in the Netherlands. There, the public has input into the competent authority's assessment of the acceptability of the EIS prepared by the proponent. The public can also appeal a competent authority's decision to proceed. In experimental EIAs in the Netherlands, the public has been involved both at the scoping phase and the review phase. In France, the public participation requirement is said to receive only lip service. There are minimum standards of public consultation set out in the legislative framework proposed for the states of the Federal Republic of Germany.

L. Participant Funding

Although no intervenor or participant funding program would be created by Bill C-78, the Minister of the Environment, when the bill was tabled in the House of Commons, announced such a program as part of an accompanying package of reforms. This program has received wide support, but critics have called for it to be included in the bill itself, with legislated criteria for funding.

Of the other countries examined here, only the Netherlands provides for intervenor funding in its environmental assessment legislation.

CONCLUSION

Canada's proposed environmental assessment legislation as set out in Bill C-78 would have a number of advantages over regimes in other countries. For example, the bill introduces the concept of mediation to the resolution of disputes in this area, a development which seems to have no international precedent in environmental assessment legislation. As well, most of the other countries studied are still seeking to develop some process for participant funding, which was announced as a program to accompany Bill C-78.

In some areas crucial to the effectiveness of the scheme in protecting Canada's environment, however, the proposed legislation falls seriously short of the examples set by legislation elsewhere in the world. The scope of the bill seems narrower than that of other systems and the potential enforceability of the provisions, particularly for follow-up and mitigation measures, seems weak. The independence of the process and of the decision-maker also leave something to be desired and Ministerial power to stop or cancel a project is lacking. Perhaps most telling is the fact that, almost unanimously, critics of Bill C-78 (both environmentalists and representatives of industry) have concluded that Canada would be better served by the continuation of the regime created by the 1984 EARP Guidelines Order, than by the enactment of Bill C-78.

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